

No. PD-0981-16

IN THE  
COURT OF CRIMINAL APPEALS  
OF TEXAS

FILED  
COURT OF CRIMINAL APPEALS  
3/13/2017  
ABEL ACOSTA, CLERK

**KEITH BALKISSOON**  
Petitioner

v.

**The State of Texas**  
Respondent

On Appeal In Case Number 11-1434-K26  
From the 26th District Court of Williamson County  
The Hon. Billy Ray Stubblefield, Judge Presiding  
Third Court of Appeals No. 03-13-00382-CR

# Brief on Discretionary Review

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## Table of Contents

Certificate of Parties. . . . .	ii
Index of Authorities. . . . .	iii
Preliminary Statement. . . . .	vi
Point of Error. . . . .	vii
<b>2) Did the court of appeals err in finding exigent circumstances existed? .5</b>	
<b>3) Can law enforcement create their own exigent circumstances?. . . . .</b>	<b>14</b>
Facts Relevant to Appeal. . . . .	1
Prayer. . . . .	18
Statement Regarding Oral Argument. . . . .	18
Certificate of Delivery. . . . .	19

## **Certificate of Parties**

Pursuant to Rule 70.3 and Rule 38.1(a), Rules of Appellate Procedure (“Tex.R.App.Pro.”), the following is a complete list of the names and addresses of all parties to the trial court’s final judgment and their counsel in the trial court, as well as appellate counsel, so the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case and so the Clerk of the Court may properly notify the parties to the trial court’s final judgment or their counsel, if any, of the judgment and all orders of the Court of Appeals.

### **Petitioner**

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## **Index of Authorities**

### **Federal Cases:**

Atwater v. City of Lago Vista, 532 U.S. 318, 347 n. 16, 121 S.Ct. 1536 (2001).....	5
Cupp v. Murphy, 412 U.S. 291, 296, 93 S.Ct. 2000 (1973).....	6
Go-Bart Imp. Co. v. United States, 282 U.S. 344, 357, 51 S.Ct. 153 (1931). ....	6
Kentucky v. King, 563 U.S. —, 131 S.Ct. 1849, 1856 (2011) . ....	6
Ker v. California, 374 U.S. 23, 40–41, 83 S.Ct. 1623 (1963) .....	6
Michigan v. Tyler, 436 U.S. 499, 509 (1978).....	6
Missouri v. McNeely, —U.S. —, 133 S.Ct. 1552, 1559 (2013). . .	5, 6, 11, 13, 14, 16
Ohio v. Robinette, 519 U.S. 33, 39, 117 S.Ct. 417 (1996). ....	6
Riley v. California, — U.S. —, 134 S.Ct. 2473, 2482 (2014). ....	16
Roaden v. Kentucky, 413 U.S. 496, 505, 93 S.Ct. 2796 (1973).....	17
Schmerber v. California, 86 S.Ct. 1826, 384 U.S. 757 (1966).....	13
Welsh v. Wisconsin, 466 U.S. 740, 749–750, 104 S.Ct. 2091 (1984).....	16

### **Texas Cases:**

Bonsignore v. State, --- S.W.3d ----2016 WL 3571274 (Tex.App. Ft. Worth June 30, 2016) .....	14
Bowman v. State, No. 05–13–01349–CR, 2015 WL 557205, at 11 (Tex.App.–Dallas Feb. 10, 2015, no pet.) . ....	15

Burcie v. State, No. 08–13–00212–CR, 2015 WL 2342876, at 3 (Tex.App.—El Paso May 14, 2015, pet. filed) .....	15
Carmouche v. State, 10 S.W.3d 323, 328 (Tex.Cr.App. 2000). ....	7
Cole v. State, 490 S.W.3d 918, 920-1 (Tex.Cr.App. 2016). ....	12-14
Colura v. State, – S.W.3d–, 2016 WL 7473948 (Tex.App. [1 <sup>st</sup> ] Houston 2016).....	13
Douds v. State, 434 S.W.3d 842, 855–56 (Tex.App.–Houston [14th Dist.] 2014) (en banc op. on reh'g), rev'd, 472 S.W.3d 670 (2015).....	16
Duff v. State, 546 S.W.2d 283 (Tex.Cr.App. 1977).....	11
Guzman v. State, 955 S.W.2d 85, 88–89 (Tex.Cr.App. 1997).....	7
Parker v. State, 206 S.W.3d 593, 598 n. 21 (Tex.Cr.App. 2006).....	14
Russell v. State, 717 S.W.2d 7, 10 (Tex.Cr.App. 1986).....	11
State v. Dixon, 206 S.W.3d 587, 590 (Tex.Cr.App. 2006).....	7
State v. Iduarte, 268 S.W.3d 544, 548 (Tex.Cr.App. 2008). ....	7
State v. Steelman, 93 S.W.3d 102, 107 (Tex.Cr.App. 2002). ....	7
Sutherland v. State, 436 S.W.3d 28 (Tex.App. --Amarillo 2014). ....	13
Weems v. State, – S.W.3d –, PD–0635–14 (Tex.Cr.App. May 25, 2016).....	12, 13

## **Cases from Other Jurisdictions:**

## **Federal Constitution:**

U.S. CONST. amend. IV.....	16
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## **Preliminary Statement**

Pursuant to Tex.R.App.Pro. 38.1(d), the following is a brief general statement of the nature of the cause or offense:

Petitioner, Keith Balkissoon, was charged by indictment with the offense of DWI 3rd, a felony, in Cause No. 11-1434-K26 in the 26<sup>st</sup> District Court of Williamson County, Texas. He was convicted in said cause and was sentenced to 4 and one half years incarceration, and a \$10,000 fine. The Court of Appeals modified the judgement below to delete the deadly weapon finding, but affirmed the judgment. This Court granted petition for review on issues 2 and 3.

### **Statement of Procedural History**

Pursuant to Tex.R.App.Pro. 68.1(d), Petitioner would show the following:

The Third Court of Appeals denied Petitioner's appeal on April 13, 2016. The Third Court denied the Motion for Rehearing on July 26, 2016.

The Court of Appeals has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals or the Supreme Court of the United States.

The Third Court of Appeals decision in this case conflicts with another court of appeals' decision on the same issue.

The Third Court of Appeals has decided an important question of state and federal law that has not been, but should be, settled by this Court.

The Third Court of Appeals has misapplied a statute in deciding this case.

### **Point of Error**

Pursuant to Tex.R.App.Pro. 38.1(e), the following are the points upon this appeal is predicated:

- 2) Did the court of appeals err in finding exigent circumstances existed?**
- 3) Can law enforcement create their own exigent circumstances?**

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Third Court of Appeals No. 03-13-00382-CR

# Brief on Discretionary Review

TO THE HONORABLE JUDGES OF THE THIRD COURT OF APPEALS:

COMES NOW, Keith Balkissoon, Petitioner in the above styled and numbered cause,  
by and through Ariel Payan, his undersigned attorney of record, and respectfully files this  
“Brief on Discretionary Review,” filed pursuant to Tex.R.App.Pro. 70.:

## **Facts Relevant to Appeal**

Petitioner was stopped for a moving violation on October 7, 2011. In his indictment,  
he was enhanced with two prior convictions for DWI, and further enhanced with an

allegation he exhibited a deadly weapon, to wit his vehicle, during the commission of the offense. (C.R. pg. 11). Before trial began, a hearing was held on Defendant's Motion to Suppress the blood sample that was taken. (R.R. Vol. 4). The state and defense both presented a single witness each, after which the trial court denied the motion. (R.R. Vol. 4, pg. 43-44). No written findings of fact were entered, but the trial court did make an oral statement that his ruling was based upon good faith rather than exigent circumstances. (R.R. vol. 4, pg. 44).

On October 7, 2011, Trooper Michael Reisen conducted a traffic stop on the vehicle operated by the defendant after noticing the defendant exit a parking lot at around 2:30 a.m. (R.R. Vol. 4 p. 10)(C.R. p. 4). The trooper testified that he took his foot off of the gas to slow his vehicle in reaction to the defendant's exit from the parking lot, that the defendant made a wide right turn, and that the defendant straddled the left lane and turn around lane. (R.R. Vol. 5 pp. 65, 69--70). There was no other traffic on the road. (R.R. Vol. 5 pp. 69--70)(State's Exhibit 1).

Trooper Reisen then stopped the vehicle, conducted a DWI investigation, and ultimately made the decision to arrest the defendant for DWI. (R.R. Vol. 4. pp. 10- 11). The Trooper recorded on video his investigation, interaction, and arrest of the defendant, and that video was admitted into evidence as State's Exhibit 1. (R.R. Vol. 4 p. 188) (R.R. Vol. 5 p. 25).

Trooper Reisen read the defendant the DIC--24 statutory warning, requesting a sample of his blood, which the defendant refused. (R.R. Vol. 4. p. 13). The Trooper then proceeded to have the defendant's blood drawn without his consent based on two prior convictions for DWI and Tex. Trans. Code Sec. 724.012. (R.R. Vol. 4 pp. 14--15). The Trooper testified he could have gotten a search warrant (R.R. Vol. 4 p. 14), and had done so in previous DWI investigations (R.R. Vol. 4 p. 15), but did not do so in this case because he felt Tex. Trans. Code Sec. 724.012 made it unnecessary to do so. (R.R. Vol.4 pp. 14-15).

The Trooper also testified that he was aware blood alcohol concentration is lost as the body metabolizes alcohol (R.R. Vol. 4 pp. 12--13), that it did not take long to draw the defendant's blood without a warrant in this case (R.R. Vol. 4 p. 15), and that his most recent previous search warrant for blood took four hours to obtain (R.R. Vol. 4 p. 16). When asked by the trial judge, the Trooper testified there were no other circumstances that would have caused him to seek a warrant or caused him to immediately take the blood other than those to which he had previously testified. (R.R. Vol. 4 p. 20).

Wayne Porter, a magistrate working in the Williamson County Jail, testified that he is one of three magistrates who serves in that capacity, that he is and was available to review and make a decision on requests for blood search warrants in DWI cases, and that there is nothing keeping the other magistrates from making such decisions. (R.R. Vol. 4 p. 21--22).

## **Summary of the Argument**

Pursuant to Tex.R.App.Pro. 38.1(g), the following is a brief summary of the argument presented in this appeal:

The lower court erred in finding exigent circumstances existed when the record below does not substantiate such a finding. The State failed to present any evidence of exigency and the trial judge made a specific finding that no exigency existed.

Law enforcement may not create a situation whereby they can claim exigency. The refusal of law enforcement to accept assistance when it is readily available, or failure to present evidence that it was not, can not create an exigent circumstance exception to the Fourth Amendment.

## **Point of Error Restated**

### **2) Did the court of appeals err in finding exigent circumstances existed?**

The court of appeal's opinion found that exigent circumstances existed at the time Trooper Reisen decided not to get a warrant to secure Petitioner's blood sample. As the basis for this, the court noted that Williamson County does not have 24 hour magistration service, that the stop happened after 2a.m., and that the trial judge could reasonable infer that no magistrate would be on duty. Therefore, Reisen would have to go through the 'lengthy process' of obtaining a warrant, and that this process took him 4 hours 'one time.' The appellate court went on to compare that 'lengthy process' to the warrantless process and therefore conclude that obtaining a warrant would have 'significantly increase the delay' in the blood draw. Slip op. 9-10.

To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, the reviewing court should look to the totality of circumstances. See *Missouri v. McNeely*, —U.S. —, 133 S.Ct. 1552, 1559 (2013). The court applies this “finely tuned approach” to Fourth Amendment reasonableness in this context because the police action at issue lacks “the traditional justification that ... a warrant ... provides.” See *id.* (quoting *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 n. 16, 121 S.Ct. 1536 (2001)). In the absence of a warrant, “the fact-specific nature of the reasonableness inquiry” demands that [the court] evaluate each case of alleged exigency based “on its own facts and

circumstances.” *Id.* (quoting *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S.Ct. 417 (1996), and *Go-Bart Imp. Co. v. United States*, 282 U.S. 344, 357, 51 S.Ct. 153 (1931)).

As the Supreme Court stated in *McNeely*. “In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.” *McNeely*, 133 S.Ct. 1561. But, in *McNeely*, the Supreme Court held that “in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.” *McNeely*, 133 S.Ct. at 1568.

The “exigent circumstances” exception “applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.” *Kentucky v. King*, 563 U.S. —, 131 S.Ct. 1849, 1856 (2011) (internal quotations omitted). Exigent circumstances may justify a reasonable yet warrantless search “because ‘there is compelling need for official action and no time to secure a warrant.’ ” *Michigan v. Tyler*, 436 U.S. 499, 509 (1978). A variety of scenarios may give rise to circumstances sufficiently exigent to justify a warrantless search, the one most relevant to the instant case being the prevention of the imminent destruction of evidence. See *McNeely*, 133 S.Ct. at 1558–59 (citing *Cupp v. Murphy*, 412 U.S. 291, 296, 93 S.Ct. 2000 (1973), and *Ker v. California*, 374 U.S. 23, 40–41, 83 S.Ct. 1623 (1963) (plurality opinion)).

A trial court's ruling on a motion to suppress is reviewed for an abuse of discretion under a bifurcated standard. *State v. Dixon*, 206 S.W.3d 587, 590 (Tex.Cr.App. 2006). The reviewing court should defer to the trial court's determination of facts but review the trial court's application of the law de novo. See *Carmouche v. State*, 10 S.W.3d 323, 328 (Tex.Cr.App. 2000). All evidence will be viewed “in the light most favorable to the trial court's ruling.” *State v. Iduarte*, 268 S.W.3d 544, 548 (Tex.Cr.App. 2008). The trial court's ruling will be upheld if there is any valid theory of law applicable to the case, even if the trial court did not base its decision on that theory. *State v. Steelman*, 93 S.W.3d 102, 107 (Tex.Cr.App. 2002)[emphasis added]. A reviewing court should review de novo the trial court's application of the law to the facts. *Guzman v. State*, 955 S.W.2d 85, 88–89 (Tex.Cr.App. 1997).

In the instant case, the suppression hearing was held during the first day of the jury trial. The State called one witness, the trooper, and the defense called one witness a Williamson County Magistrate. On direct exam of the trooper the only information regarding the metabolization of alcohol presented was the following:

Q: What's your understanding of alcohol concentrations in the blood? Is that something that's static, or is that something that you lose as time goes on?

A I'll lose it as time goes on.

Q Is that just the body metabolizing the alcohol?

A Yes, sir.

R.R. Vol. 4 pg. 12-13. And at the end of his direct the prosecutor asked the following:

Q Okay. And again, is it your understanding that this whole time blood evidence in the form of an alcohol concentration, is it staying static or is it being lost?

A It's depleting.

R.R. Vol. 4 pg. 17. This is all the evidence that the trial judge had regarding this issue, in addition the State did not ask for the trial court to take judicial notice of anything. This is insufficient evidence to prove the rate of loss over time, and how pressing the issue was to collect Appellant's blood. In addition, no evidence was presented of the amount of time that had actually passed in the collecting of Petitioner's blood, or how long it took to get a blood sample at the time the arrest took place (June of 2010), or how long it would take to get a warrant. The State acknowledged in its own brief the lack of clarity in Riesen's testimony about the length of time it takes to secure a warrant. See Appellee's Brief pg. 10, FN 2.

When the State attempted to produce evidence to substantiate the exigent circumstances that they were arguing existed, they produced the following evidence:

Q So at the time you took Mr. Balkissoon's blood, you were under the understanding that the law commanded you to do so in his specific circumstance. Is that what I'm hearing you say?

A Yes. Yes, sir.

Q Okay. And that's because he had two prior convictions?

A He did.

Q Okay. And at this point, you could have gotten a search warrant. Correct?

A I could have.

Q Why didn't you?

A There was no need to. The law -- the law was behind me taking the blood sample without a search warrant.

R.R. Vol. 4 pg. 14-15. At no point does Trooper Reisen say there were exigent circumstances. No evidence was ever produced that some emergency existed that kept him from securing a warrant. Indeed on cross examination the trooper stated:

Q . . . You made no effort at any time to obtain a search warrant.

A No, I did not.

R.R. Vol. 4 pg. 20. Finally, the trial judge asked:

COURT: Okay. So, Trooper, there were no other -- or perhaps I misunderstood your testimony. There were no other circumstances that would have caused you to seek a warrant or caused you to immediately take the blood other than what you've stated?

WITNESS: No. No, sir. No, there wasn't.

R.R. Vol. 4 pg. 20.

The defense went on to present Magistrate Wayne Porter in order to substantiate that a method existed for the trooper to secure a timely warrant. The magistrate testified:

Q All right. And as part of your duties in that employment, have you had occasion to be approached by law enforcement -- and I'll just narrow it -- by the Department of Public Safety concerning search warrants for blood draws?

A Yes, I have.

Q And is it your experience -- we've already had some testimony, I don't know if you heard it, that covered a lot of this, but -- these requests can come day or night?

A That's right.

Q And you, to the extent that you are able to, have made yourself available for these -- for these reviews for the search warrant?

A That's correct. I don't remember exactly how that started, but I am available.

Q And was that in place in October of 2011?

....

A I'm sure it was, yeah.

Q And you're not the only magistrate. Is that correct?

A I'm not the only jail magistrate. That's correct.

R.R. Vol. 4, pg. 21-22. Even if there was no 24 hour magistrate 'on duty', there was a procedure in place to contact a magistrate. Magistrate Porter was available to review a warrant request on the night of the incident. In addition, two other magistrates were also working at the time, and procedures were in place to call upon them to review a warrant at all hours. The State presented no evidence of how long this process actually took, only that the trooper did not attempt to utilize it.

The trial court ruled that there were no exigent circumstances, in relevant part:

DEFENSE: Just to clarify, Your Honor. You are not -- *your ruling is not based upon exigent circumstances but, rather, upon good faith.* Is that correct?

COURT: *That's correct.*

DEFENSE: Thank you, Your Honor.

COURT: *I specifically asked the Trooper whether there were any circumstances other than the ones he had stated, and he said no.*

RR Vol. 4, pg 44. [Emphasis added]. The finder of fact made a specific oral finding on the record that no exigent circumstances existed in this case. A reviewing court abuses its discretion when it overturns a specific finding by the trial court without substantiation. Duff v. State, 546 S.W.2d 283 (Tex.Cr.App. 1977).

The facts are not in dispute. No emergency existed, or if there was an emergency no evidence of an emergency was presented to the trial court. There is nothing in the record which supports the trial judge's findings of exigency or the Third Court of Appeals' decision in affirming it. It is the State's burden to prove the exigent circumstance. Russell v. State, 717 S.W.2d 7, 10 (Tex.Cr.App. 1986). The traffic stop was routine, the investigation was routine, the only delay in processing Petitioner was an unknown time delay while the vehicle was being towed. The processing of a vehicle in a DWI is also routine. The state did not present any evidence of how long the delay was, and if this delay was substantial enough to warrant an 'exigent' situation for the exigency review. Therefore, without evidence there is nothing the trial judge or any later reviewing court can base their decision upon.

The fact that alcohol dissipates in the blood once drinking has ceased is not an exigent circumstance on its own. See, McNeely, 133 S.Ct. at 1568. Therefore, there must be some

other factor which constitutes exigency. An exigent circumstance is an emergency situation, which allows law enforcement to bypass the need for an impartial magistrate to review the probable cause supporting the request for a warrant to conduct a search. No emergency existed, this was business as usual in Williamson County and as such, a finding of exigency in a routine procedure would create a ‘small county’ exception to the 4<sup>th</sup> amendment.

Two cases handed down by this Court on the same day exemplify the issue troubling the lower courts. In *Cole*, this Court found that an emergency existed that qualified as an exigent circumstance. In that case the defendant was involved in a automobile wreck that included a fatality, and took multiple officers three hours to clear, before being able to take the suspect to get his blood drawn. See *Cole v. State*, 490 S.W.3d 918, 920-1 (Tex.Cr.App. 2016). “Law enforcement was confronted with not only the natural destruction of evidence through natural dissipation of intoxicating substances, but also with the logistical and practical constraints posed by a severe accident involving a death and the attendant duties this accident demanded.” *Cole*, 490 S.W.3d at 927. This Court recognized the actual emergency that faced law enforcement.

In *Weems v. State*, 493 S.W.3d 574 (Tex.Cr.App. 2016), this Court reached the opposite conclusion. In *Weems*, the defendant was involved in an accident, where witnesses saw him flee the scene. Defendant was found 40 minutes later hiding under another vehicle. Due to his injuries he was transported to a nearby hospital and law enforcement requested a blood draw from the hospital staff. The blood draw was not done until three hours after

the accident. Weems, 493 S.W.3d at 576. This Court held that no exigent circumstances existed due to the lack of evidence presented by the State. “We are therefore left with the inability to weigh the time and effort required to obtain a warrant against the circumstances that informed [law enforcement’s] decision to order the warrantless blood draw.” Weems, 493 S.W.3d at 581.

The differential in all of these cases is the scope of the situation that is occurring. When you have a situation where officers are trying to control a scene, process a crime and protect themselves and the citizenry, you have the makings of an exigent circumstance. See, Cole, 490 S.W.3d at 927; Schmerber v. California, 86 S.Ct. 1826, 384 U.S. 757 (1966). But when an officer is faced with a situation where he is processing a routine crime scene, courts have traditionally found that exigency does not exist and the Fourth Amendment requires a search warrant. Weems, 493 S.W.3d at 582; McNeely, 133 S.Ct. 1552; Colura v. State, – S.W.3d.–, 2016 WL 7473948 (Tex.App. [1<sup>st</sup>] Houston 2016); Sutherland v. State, 436 S.W.3d 28 (Tex.App. --Amarillo 2014).

Although both cases deal with an accident and a three hour delay in getting to a location where a blood draw was possible, Cole and Weems reach very different conclusions. Whereas, Cole shows through its facts that an ‘all hands on deck’ emergency existed in trying to process and reopen a road, Weems does not. Like the instant case, a ‘routine’ police matter does not equal an exigent circumstance. Here the State failed to

prove exigency, and the Third Court of Appeals applied an incorrect standard in finding an emergency situation existed in this case.

### **3) Can law enforcement create their own exigent circumstances?**

One of the factors enumerated in *McNeely* is whether there is other law enforcement able to provide assistance to the arresting officer to help speed up the process. The court of appeals decision relies, in part, upon a determination that there were no other officers available to assist the trooper with the arrest; and, therefore under a totality of the evidence he was justified in not attempting to get a warrant. Slip op. at 10. The other factors in *McNeely* require a determination of, “the procedures in place for obtaining a warrant”, “the availability of a magistrate judge,” and, “the practical problems of obtaining a warrant within a time frame that still preserves the opportunity to obtain reliable evidence.” See *McNeely*, at 1568; *Cole*, 490 S.W.3d at 926.

The police may not create their own exigency to make a warrantless arrest or search. See *Parker v. State*, 206 S.W.3d 593, 598 n. 21 (Tex.Cr.App. 2006). Exigent circumstances do not meet Fourth Amendment standards if the government deliberately creates them. *Id.*; and, *Bonsignore v. State*, --- S.W.3d ----2016 WL 3571274 (Tex.App. Ft. Worth June 30, 2016). The evidence presented at trial was that the trooper can call for local assistance, but he does not indicate whether he did this or not, nor what the response was.

Q Okay. Can you describe for the Court how you typically conduct your DWI investigations?

A Usually, it's by myself. I may or may not – Williamson County may or may not come back me up. But even if someone does come, it's my investigation. I do everything, myself.

Q Okay. So nobody helped you out with warrant paperwork?

A No.

Q You wouldn't have a backup officer to, say, take the suspect to the hospital while you go procure the warrant?

A No, I do not.

R.R. Vol. 4, pg. 16-17. The Trooper works alone. The video of the Trooper's interaction with Petitioner is in evidence. In the video, the Trooper meets with a Williamson County Sheriff's officer during the arrest and sends them on their way. See State's Exhibit 1. Regardless of local assistance, the Trooper would do all the work himself and not utilize additional local resources. Therefore, this particular arrest is no different from his normal arrest procedures, it is not 'exigent'. The Trooper chooses not to utilize the resources available to him to comply with the law.

Other courts of appeals have determined that exigent circumstances did not justify a warrantless blood draw because the officer never tried to get a warrant and, there was no evidence that the officer could not have taken steps to obtain a warrant expeditiously. See, e.g., *Burcie v. State*, No. 08–13–00212–CR, 2015 WL 2342876, at 3 (Tex.App.—El Paso May 14, 2015, pet. filed) (not designated for publication); *Bowman v. State*, No. 05–13–01349–CR, 2015 WL 557205, at 11 (Tex.App.—Dallas Feb. 10, 2015, no pet.) (not designated for publication); *Douds v. State*, 434 S.W.3d 842, 855–56

(Tex.App.–Houston [14th Dist.] 2014) (en banc op. on reh'g), rev'd, 472 S.W.3d 670 (2015) (holding that appellant did not preserve Fourth Amendment complaint). Such is the case here, Trooper Reisen never even attempted to procure a warrant, relying solely on the Transportation Code and was unable to articulate any exigent circumstances to justify his actions. There was no evidence presented at trial or in the current record that substantiates a finding of exigency. “[T]he police bear a heavy burden,” the Supreme Court has cautioned, “when attempting to demonstrate an urgent need that might justify warrantless searches.” *Welsh v. Wisconsin*, 466 U.S. 740, 749–750, 104 S.Ct. 2091 (1984).

In addition, the Third Court focuses on the lack of 24 hour magistration and the testimony of Judge Porter that there were no magistrates on duty at the jail after hours. This is not a unique occurrence. An exigent or emergency situation (not to be confused with the ‘emergency doctrine’), is required to prove an exception to the warrant requirement demanded by the Fourth Amendment. U.S. CONST. amend. IV; *Riley v. California*, — U.S. —, 134 S.Ct. 2473, 2482 (2014). The exigency exception operates “when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.” *McNeely*, 133 S.Ct. at 1568. Exigency potentially provides for a reasonable, yet warrantless search “because ‘there is compelling need for official action and no time to secure a warrant.’ ” A search “without prior judicial evaluation” may be

reasonable “[w]here there are exigent circumstances in which police action literally must be ‘now or never’ to preserve the evidence of the crime.” *Roaden v. Kentucky*, 413 U.S. 496, 505, 93 S.Ct. 2796 (1973). No such emergency situation existed or was shown by the State in this case. Judge Porter testified that he was available at the time to provide assistance if asked, and there were two other magistrates who were also available to respond to these routine requests for warrants. R.R. Vol. 4, pg. 21-22.

## **Prayer**

WHEREFORE, PREMISES CONSIDERED, KEITH BALKISSOON, Petitioner in the above styled and numbered cause respectfully prays that this Court reverse the decision of the Court of Appeals, and grant any and all relief to which Petitioner is entitled.

Respectfully submitted,

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## **Statement Regarding Oral Argument**

Oral Argument has been denied.

## **Certificate of Compliance**

I hereby certify pursuant to T.R.A.P. 9.4(i)(3), the word count for this document, as determined by the word processing program is 3845 .

/s/ Ariel Payan

**Ariel Payan**

### **Certificate of Delivery**

This is to certify that a true and correct copy of the above and foregoing “Petitioner’s Brief on Discretionary Review” was hand-delivered, mailed postage pre-paid or transmitted via telecopier (*fax*) to the office of the District Attorney of Williamson County, Texas; State Prosecuting Attorney; and to Appellant at the address listed in the Certificate of Parties, on March 13, 2017.

/s/ Ariel Payan

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**Ariel Payan**